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No. 84-1899

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

IRENE D. MUELLER,
Petitioner,
vs.
DAVID DIEBALL, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID R. HIGHMAN, ESQ.
JOHNSON, HIGHMAN & JOHNSON
4100 MacArthur Blvd.
Suite 350
Mail to: P.O. Box 1786
Newport Beach, CA 92663
(714) 752-2511
Attorneys for Respondents Carol J. Manstrom, Valerie Rich Johnson, Dolores Mae Carson, Marijane Ramstead, Ted Chatterton, Liberty Mutual Insurance Company and J. C. Penney Company, Inc.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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RESPONDENT'S BRIEF

STATEMENT OF LEGAL ISSUES

1. WHETHER THE UNCONTROVERTED DECLARATIONS OF RESPONDENTS RENDER THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS PROPER.

2. WHETHER THERE IS ANY EVIDENCE CONTRARY TO THE FINDING BY THE DISTRICT COURT THAT THESE RESPONDENTS ACTED IN GOOD FAITH AND THAT THEY DID NOT ACT UNDER COLOR OF LAW.

STATEMENT OF THE CASE

1. Opinion Below

The Defendants-Respondents adopt the Plaintiff-Petitioner's statement of opinion below for purposes of this appeal alone.

2. Jurisdictional Statement

The Defendants-Respondents adopt the Plaintiff-Petitioner's jurisdictional statement for purposes of this appeal alone.

3. Statement of Relevant Facts

The Defendants-Respondents adopt the Plaintiff-Petitioner's statement of facts for purposes of this appeal alone.

ARGUMENT

1. The Petition Raises No Error in the Finding by the District Court For Summary Judgment in Favor of These Individual Respondents.

Petitioner's brief is distinguished by its complete lack of argument contesting the finding by the District Court in favor of these individual respondents. The entire thrust of petitioner's argument, in support of her Writ of Certiorari, is that the police officers negligently lost the identification card of a material witness, thereby depriving petitioner of due process and violating her civil rights. Respondents defer to and join in the response of the police officers to those issues which do not directly affect these respondents.

Petitioner, however, does not dispute in her Petition any of the Findings of Fact and Conclusions of Law by the District Court regarding these private defendants, including the following:

a. None of the defendants conspired to destroy this business card, nor did any of them conspire to conceal the identity of "Mr. X.";

b. All of the individual defendants in this action acted with good faith and with the reasonable belief that their actions were legal in connection with the detention and arrest of plaintiff for shoplifting on January 25, 1979; and

c. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law. [Appendix "A" to Petition, pp. 3, 4 and 7].

Petitioner has made no showing at any stage of this litigation to controvert the Affidavits of these defendants upon which the aforementioned findings and conclusions were made. Nor does she contend in the instant petition that these defendants ever acted other than in good faith.

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit agreed that plaintiff could not maintain a cause of action under 42 *U.S.C.* § 1983 against any of the private individuals because there had been no showing that they were acting under color of state law. *Fonda v. Gray,* 707 F.2d 435, 438-39 (9th Cir. 1983) [Appendix "B" to the Petition, p. 4].

Plaintiff does not contest those findings in her Petition. It is respectfully submitted that plaintiff's reason for not raising any such issues is because she had no evidence to refute the finding by the District Court in favor of these defendants and therefore her Petition should be denied.

2. Respondents' Motion For Summary Judgment Determined That No Material Issues Were Present.

Plaintiff cites numerous cases for the proposition that she could rely upon movants' declarations in their motion for summary judgment to establish that genuine issues of fact existed and therefore the motions should be denied. However, she fails to outline where the declarations raised such issues. Further, plaintiff has never provided contrary evidence to question the declarations of these respondents to show that the District Court's decision was in error.

Further, *Henderson v. Fisher,* 631 F.2d 1115 (3rd Cir. 1980), involved a motion to dismiss under *F.R.C.P.* 12(b)(e) where the court evaluated conflicting evidence to find that sufficient facts existed for plaintiff to maintain her claim. No conflicting evidence exists here.

Plaintiff's reliance upon *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598 (1969) is also misplaced. Respondents concur that a motion for summary judgment must establish the absence of a genuine issue of fact; that case found that triable issues existed based upon examination of other evidence presented including affidavits and plaintiff's deposition.

No contrary evidence has ever been submitted by Irene Mueller. The Supreme Court in *Adickes, supra,* stated at page 160:

> If respondent had met its initial burden . . . Rule 56(e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint.

Respondents submit that Irene Mueller had no contrary evidence to dispute the facts upon which the summary judgment was granted.

CONCLUSION

It is respectfully submitted that no error exists nor is any being asserted by plaintiff against these respondents. The findings and conclusions by the District Court were made upon competent evidence. These defendants at all times acted in good faith and plaintiff failed to meet her burden to show that their acts were done under color of state law to allow her to maintain an action against them under 42 *U.S.C.* § 1983. The Petition for Writ of Certiorari should be denied.

DATED: September 4, 1985

Respectfully submitted,

JOHNSON, HIGHMAN & JOHNSON

By: DAVID R. HIGHMAN
Attorneys for Respondents Carol J. Manstrom, Valerie Rich Johnson, Dolores Mae Carson, Marijane Ramstead, Ted Chatterton, Liberty Mutual Insurance Company and J. C. Penney Company, Inc.